



LIBRARY OF CONGRESS

Copyright Royalty Board

37 CFR Part 384

[Docket No. 2012-1 CRB Business Establishments II]

Determination of Rates and Terms for Business Establishment Services

AGENCY: Copyright Royalty Board, Library of Congress.

ACTION: Proposed rule.

SUMMARY: The Copyright Royalty Judges are publishing for comment proposed regulations that set the rates and terms for the making of an ephemeral recording of a sound recording by a business establishment service for the period January 1, 2014, through December 31, 2018.

DATES: Comments and objections are due no later than [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE **FEDERAL REGISTER**].

ADDRESSES: Comments and objections may be sent electronically to crb@loc.gov. In the alternative, send an original, five copies, and an electronic copy on a CD either by mail or hand delivery. Please do not use multiple means for transmission. Comments and objections may not be delivered by an overnight delivery service other than the U.S. Postal Service Express Mail. If by mail (including overnight delivery), comments and objections must be addressed to: Copyright Royalty Board, P.O. Box 70977, Washington, D.C. 20024-0977. If hand delivered by a private party, comments and objections must be brought between 8:30 a.m. and 5 p.m. to the Copyright Office Public Information Office, Library of Congress, James Madison Memorial Building, Room LM-

401, 101 Independence Avenue SE., Washington, DC 20559-6000. If delivered by a commercial courier, comments and objections must be delivered between 8:30 a.m. and 4 p.m. to the Congressional Courier Acceptance Site located at 2nd and D Street NE., Washington, DC, and the envelope must be addressed to Copyright Royalty Board, Library of Congress, James Madison Memorial Building, LM-403, 101 Independence Avenue, SE., Washington, DC 20559-6000.

FOR FURTHER INFORMATION CONTACT: LaKeshia Keys, Program Specialist, by telephone at (202) 707-7658 or email at crb@loc.gov.

SUPPLEMENTARY INFORMATION:

In 1995, Congress enacted the Digital Performance in Sound Recordings Act, Public Law No. 104-39, which created an exclusive right for copyright owners of sound recordings, subject to certain limitations, to perform publicly sound recordings by means of certain digital audio transmissions. Among the limitations on the performance right was the creation of a statutory license for nonexempt, noninteractive digital subscription transmissions. 17 U.S.C. 114(d).

The scope of the section 114 statutory license was expanded in 1998 upon the passage of the Digital Millennium Copyright Act of 1998 (DMCA), Public Law No. 105-34, in order to allow for the public performance of a sound recording when made in accordance with the terms and rates of the statutory license, 17 U.S.C. 114(d), by a preexisting satellite digital audio radio service or as part of an eligible nonsubscription transmission. In addition to expanding the section 114 license, the DMCA also created a statutory license for the making of an “ephemeral recording” of a sound recording by certain transmitting organizations. 17 U.S.C. 112(e). This license allows entities that

transmit performance of sound recordings to business establishments, pursuant to the limitations set forth in section 114(d)(1)(C)(iv), to make an ephemeral recording of a sound recording for a later transmission. *Id.* The license also provides a means by which a transmitting entity with a statutory license under section 114(f) can make more than one phonorecord permitted under the exemption set forth in section 112(a). 17 U.S.C. 112(e).

Chapter 8 of the Copyright Act requires the Copyright Royalty Judges (Judges) to conduct proceedings every five years to determine the rates and terms for “the activities described in section 112(e)(1) relating to the limitation on exclusive rights specified by section 114(d)(1)(C)(iv).”¹ 17 U.S.C. 801(b)(1), 804(b)(2). In accordance with section 804(b)(2), the Judges commenced a proceeding to set rates and terms for the making of ephemeral sound recordings by a business establishment service on January 5, 2007, 72 FR 584, and published in the **Federal Register** on March 27, 2008, final regulations setting those rates and terms. 73 FR 16199. Therefore, the next proceeding was to be commenced in January 2012. 17 U.S.C. 804(b)(2).

Accordingly, the Judges published a notice commencing the current proceeding and requesting interested parties to submit their petitions to participate. 77 FR 133 (Jan. 3, 2012). Petitions to Participate were received from: Pandora Media, Inc.; Music Choice; DMX, Inc.; Muzak LLC; Music Reports, Inc.; Clear Channel Broadcasting, Inc.; SoundExchange, Inc.; and Sirius XM Radio, Inc. The Judges set the timetable for the three-month negotiation period, *see* 17 U.S.C. 803(b)(3), and directed the participants to submit their written direct statements no later than November 16, 2012. Subsequently, the Judges granted the participants’ request to extend the deadline to November 29, 2012,

¹ Prior to the enactment of the Copyright Royalty and Distribution Reform Act of 2004, which established the Copyright Royalty Judges, rates and terms for the statutory license under section 112(e) were set under the Copyright Arbitration Royalty Panel system, which was administered by the Librarian of Congress.

in order to allow the participants to finalize a settlement agreement. *See Order Granting Joint Motion for Extension of Time for Filing Written Direct Statements*, Docket No. 2012-1 CRB Business Establishments II (Nov. 14, 2012). On November 29, 2012, the Judges received a Motion to Adopt Settlement stating that all participants had reached a settlement obviating the need for a hearing.

Section 801(b)(7)(A) of the Copyright Act authorizes the Judges to adopt rates and terms negotiated by “some or all of the participants in a proceeding at any time during the proceeding” provided they are submitted to the Judges for approval. This section provides in part that the Judges must provide to both non-participants and participants to the rate proceeding who “would be bound by the terms, rates, or other determination set by any agreement * * * an opportunity to comment on the agreement.” 17 U.S.C. 801(b)(7)(A)(i). Participants to the proceeding may also “object to [the agreement’s] adoption as a basis for statutory terms and rates.” *Id.* The Judges “may decline to adopt the agreement as a basis for statutory terms and rates for participants that are not parties to the agreement,” only “if any participant [to the proceeding] objects to the agreement and the [Judges] conclude, based on the record before them if one exists, that the agreement does not provide a reasonable basis for setting statutory terms or rates.” 17 U.S.C. 801(b)(7)(A)(ii).

Rates and terms adopted pursuant to section 801(b)(7)(A) are binding on all copyright owners of sound recordings and business establishment services making an ephemeral recording of a sound recording for the period January 1, 2014, through December 31, 2018.

As noted above, the public may comment and object to any or all of the proposed regulations contained in this notice. Such comments and objections must be submitted no later than [INSERT DATE 30 DAYS AFTER THE DATE OF PUBLICATION IN THE **FEDERAL REGISTER**].

List of Subjects in 37 CFR Part 384

Copyright, Digital audio transmissions, Ephemeral recordings, Performance right, Sound recordings.

Proposed Regulations

For the reasons set forth in the preamble, the Copyright Royalty Judges propose to amend part 384 of chapter III of title 37 of the Code of Federal Regulations to read as follows:

PART 384—RATES AND TERMS FOR THE MAKING OF EPHEMERAL RECORDINGS BY BUSINESS ESTABLISHMENT SERVICES

1. The authority citation for part 384 continues to read as follows:

Authority: 17 U.S.C. 112(e), 801(b)(1).

§ 384.1 [Amended]

2. Section 384.1 is amended as follows:

- a. In paragraph (a), by removing “§ 384.2(a)” and adding “§ 384.2” in its place, and by removing “2009-1013” and adding “January 1, 2014, through December 31, 2018” in its place;

- b. In paragraph (b), by removing “licenses set forth in 17 U.S.C. 112” and adding “license set forth in 17 U.S.C. 112(e)” in its place; and

c. In paragraph (c), by removing “services” and adding “Licensees” in its place.

3. Section 384.2 is amended by revising the definition for “*Copyright Owner*” to read as follows:

§ 384.2 Definitions.

* * * * *

Copyright Owners are sound recording copyright owners who are entitled to royalty payments made under this part pursuant to the statutory license under 17 U.S.C. 112(e).

* * * * *

§ 384.3 [Amended]

4. Section 384.3 is amended as follows:

a. In paragraph (a), by removing “service pursuant to the limitation on exclusive rights specified by 17 U.S.C. 114(d)(1)(C)(iv)” and adding “Business Establishment Service” in its place and removing “10%” and adding “12.5%” in its place; and

b. In paragraph (b), by removing “\$10,000 for each calendar year” and adding “\$10,000 for each calendar year of the License Period” in its place.

5. Section 384.4 is amended as follows:

a. By revising the paragraph heading for paragraph (a);

b. In paragraph (b)(2)(i), by removing “condition precedent in paragraph (b)(2) of this section” and adding “condition precedent in this paragraph (b)(2)” in its

place, and by removing “authorized such Collective” and adding “authorized the Collective” in its place;

- c. By revising paragraphs (c) through (e);
- d. By revising introductory text of paragraph (f);
- e. In paragraph (f)(2), by removing “facsimile number” and adding “facsimile number (if any)” in its place, and by removing “individual or individuals” and adding “person” in its place;
- f. In paragraph (f)(3), by removing “handwritten”;
- g. In paragraph (f)(3)(i), by removing “a corporation” and adding “corporation” in its place;
- h. In paragraph (f)(6), by removing “a corporation” and adding “corporation” in its place;
- i. In paragraph (f)(8), by removing “if the Licensee is a corporation or partnership,”;
- j. By revising paragraphs (g) and (h); and
- k. By removing paragraph (i).

The revisions read as follows:

§ 384.4 Terms for making payment of royalty fees and statements of account.

(a) *Payment to the Collective.* * * *

* * * * *

(c) *Monthly payments.* A Licensee shall make any payments due under § 384.3(a) on a monthly basis on or before the 45th day after the end of each month for that month. All monthly payments shall be rounded to the nearest cent.

(d) *Minimum payments.* A Licensee shall make any minimum payment due under § 384.3(b) by January 31 of the applicable calendar year, except that payment by a Licensee that has not previously made Ephemeral Recordings pursuant to the license under 17 U.S.C. 112(e) shall be due by the 45th day after the end of the month in which the Licensee commences to do so.

(e) *Late payments.* A Licensee shall pay a late fee of 1.0% per month, or the highest lawful rate, whichever is lower, if either or both a required payment or statement of account for a required payment is received by the Collective after the due date. Late fees shall accrue from the due date until both the payment and statement of account are received by the Collective.

(f) *Statements of account.* For any part of the License Period during which a Licensee operates a Business Establishment Service, at the time when a minimum payment is due under paragraph (d) of this section, and by 45 days after the end of each month during the period, the Licensee shall deliver to the Collective a statement of account containing the information set forth set forth in this paragraph (f) on a form prepared, and made available to Licensees, by the Collective. In the case of a minimum payment, or if a payment is owed for such month, the statement of account shall accompany the payment. A statement of account shall contain only the following information:

* * * * *

(g) *Distribution of royalties.* (1) The Collective shall promptly distribute royalties received from Licensees directly to Copyright Owners, or their designated agents, that are entitled to such royalties. The Collective shall only be responsible for making

distributions to those Copyright Owners or their designated agents who provide the Collective with such information as is necessary to identify the correct recipient. The Collective shall distribute royalties on a basis that values all Ephemeral Recordings by a Licensee equally based upon the information provided under the reports of use requirements for Licensees contained in § 370.4 of this chapter.

(2) If the Collective is unable to locate a Copyright Owner entitled to a distribution of royalties under paragraph (g)(1) of this section within 3 years from the date of payment by a Licensee, such royalties shall be handled in accordance with § 384.8.

(h) *Retention of records.* Books and records of a Licensee and of the Collective relating to payments of and distributions of royalties shall be kept for a period of not less than the prior 3 calendar years.

§ 384.5 [Amended]

6. Section 384.5 is amended as follows:

a. In paragraph (a), by removing “part” and adding “section” in its place, and by removing “account, any information” and adding “account and any information” in its place;

b. In paragraph (b), by removing “The Collective shall have” and adding “The party claiming the benefit of this provision shall have” in its place;

c. In paragraph (c), by removing “activities directly related thereto” and adding “activities related directly thereto” in its place;

d. In paragraph (d)(1), by removing “work, require access to the records” and adding “work require access to Confidential Information” in its place;

e. In paragraph (d)(2), by removing “Collective committees” and adding “the Collective committees” in its place, and by removing “confidential information” and adding “Confidential Information” in its place each place it appears;

f. In paragraph (d)(3), by removing “respect to the verification of a Licensee’s royalty payments” and adding “respect to verification of a Licensee’s statement of account” in its place;

g. In paragraph (d)(4), by removing “Copyright owners whose works” and adding “Copyright Owners, including their designated agents, whose works” in its place, by removing “, or agents thereof”, and by removing “confidential information” and adding “Confidential Information” in its place; and

h. In paragraph (e), by removing “to safeguard all Confidential Information” and adding “to safeguard against unauthorized access to or dissemination of any Confidential Information” in its place, and by removing “belonging to such Collective” and adding “belonging to the Collective” in its place.

7. Section 384.6 is amended by revising paragraph (d) to read as follows:

§ 384.6 Verification of royalty payments.

* * * * *

(d) *Acquisition and retention of report.* The Licensee shall use commercially reasonable efforts to obtain or to provide access to any relevant books and records maintained by third parties for the purpose of the audit. The Collective shall retain the report of the verification for a period of not less than 3 years.

* * * * *

8. Section 384.7 is amended as follows:

a. In paragraph (a), by removing “Provided” and adding “provided” in its place; and

b. By revising paragraph (d).

The revision reads as follows:

§ 384.7 Verification of royalty distributions.

* * * * *

(d) *Acquisition and retention of record.* The Collective shall use commercially reasonable efforts to obtain or to provide access to any relevant books and records maintained by third parties for the purpose of the audit. The Copyright Owner requesting the verification procedure shall retain the report of the verification for a period of not less than 3 years.

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9. Section 384.8 is revised to read as follows:

§ 384.8 Unclaimed funds.

If the Collective is unable to identify or locate a Copyright Owner who is entitled to receive a royalty distribution under this part, the Collective shall retain the required payment in a segregated trust account for a period of 3 years from the date of distribution. No claim to such distribution shall be valid after the expiration of the 3-year period. After expiration of this period, the Collective may apply the unclaimed funds to offset any costs deductible under 17 U.S.C. 114(g)(3). The foregoing shall apply notwithstanding the common law or statutes of any State.

Dated: July 12, 2013

Suzanne M. Barnett,
Chief Copyright Royalty Judge.

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